

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY G. JONES and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 99-2481; Submitted on the Record;
Issued September 1, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability on November 18, 1996 causally related to his August 12, 1994 employment injury.

On August 12, 1994 appellant, then a 48-year-old aircraft maintenance supervisor, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that, on August 5, 1994, he sustained a lumbar strain. Appellant stopped work on August 19, 1994 and returned to work on August 26, 1994. This claim was accepted by the Office of Workers' Compensation Programs for lumbar strain, and benefits were paid.

On December 12, 1996 appellant filed a notice of recurrence of disability and claim for continuation of pay/compensation (Form CA-2a), alleging a recurrence commencing on November 18, 1996. In a decision dated March 14, 1997, the Office rejected appellant's recurrence claim, noting that the evidence failed to establish that the claimed recurrence was causally related to the injury of August 5, 1984.

On March 21, 1997, April 24 and June 1, 1998 appellant filed requests for reconsideration. These requests were denied on May 30, 1997, May 5 and July 6, 1998, respectively.

On September 29, 1998 appellant filed another request for reconsideration. In support thereof, appellant submitted a July 16, 1998 medical report by Dr. Timothy A. Puckett, a Board-certified orthopedic surgeon, wherein Dr. Puckett noted:

"In my opinion, even if this patient had a preexisting pain in his back, preexisting problems, the injury that he sustained in 1994 directly exacerbated it and made it worse and is the exact result of why he ended up needing surgery. Most likely he would not have needed surgery had the injury not occurred. In my opinion, this should be taken care of for him."

On October 23, 1998 the Office referred appellant to Dr. Phillip McCown, a Board-certified orthopedic surgeon, for a second opinion. In a medical opinion dated November 23, 1998, Dr. McCown opined that he did “not see that the injury of [August 5, 1994], materially altered the natural course of [appellant’s] preexisting degenerative lumbar disc disease to a point that it required surgery on [January 20, 1998].” He based this conclusion on the fact that appellant had been having back trouble for years and frequently had episodes that would last six to seven weeks at a time, and that the injury did not change his magnetic resonance imaging [MRI] studies. Dr. McCown noted that degenerative changes usually will continually get worse.

The Office reviewed appellant’s case on the merits, and in a decision dated December 7, 1998, concluded that, as the weight of the medical evidence did not support that the claimed recurrence was medically connected to his August 5, 1994 work injury, reconsideration was denied.

On June 24, 1999 appellant again requested reconsideration, and submitted in support thereof statements from several coworkers who noted appellant’s complaints of back pain. In a decision dated July 19, 1999, the Office, after a limited review, denied appellant’s request for reconsideration, finding that the additional evidence submitted was not sufficient to require merit review of the case.

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

Dr. Puckett, appellant’s physician, opined that appellant’s injury that he sustained in 1994 “directly exacerbated” appellant’s preexisting condition in his back which ultimately required surgical treatment in 1998. Dr. McCown, the second opinion physician, disagreed, finding that the August 1994 injury did not materially alter the course of appellant’s preexisting degenerative lumbar disc disease and did not require the January 1998 surgery. The medical evidence of record is therefore in conflict on the issue of whether appellant’s August 1994 injury resulted in the alleged recurrence.

Section 8123(a) of the Act provides that, when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹ Accordingly, this case will be remanded to the Office for resolution of the conflict. On remand, the Office should refer appellant, along with the case record and a statement of accepted facts, to an appropriate specialist for a rationalized opinion on the issue in conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

¹ *Lawrence C. Parr*, 48 ECAB 445, 453 (1997).

The decisions of the Office of Workers' Compensation Programs dated July 19, 1999 and December 7, 1998 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
September 1, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member